The international compliance assurance programme reviewed

Martini, Mario; Russo, Ronald

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Ronald Russo and Mário Henrique Martini***

The International Compliance Assurance Programme Reviewed: The Future of Cooperative Tax Compliance?

In this article, the authors examine the OECD's International Compliance Assurance Programme (ICAP) and whether the ICAP can be regarded as an attempt to introduce an international and multilateral cooperative compliance regime.

1. Introduction

Based on the experience of various countries,[1] the OECD advanced the pillars and elements of cooperative compliance programmes in publications of 2008[2] and 2013.[3] This article investigates if these pillars and elements can be identified in the International Compliance Assurance Programme (ICAP) and if the ICAP is an attempt to introduce an international and multilateral cooperative compliance regime.

Empirical evidence suggests that the same level of tax compliance can be realized either due to taxpayer perception of the power of the tax authorities or due to taxpayer trust in the tax authorities.[4] In a hypothetical tax environment in which taxpayers have no trust in the tax authorities, the level of tax enforcement to collect taxes would have to be at a maximum, as there would be no voluntary compliance. On the other hand, if, in such a hypothetical tax environment, taxpayers fully trusted the tax authorities, voluntary compliance would account for all tax collection, with no need for tax enforcement.

In both scenarios, although tax collection would be the same, the necessary expenditure by tax administrations would be very different. Due to the increasing complexity of commercial life and the internationalization of relationships, tax enforcement demands ever increasing resources from tax administrations to keep pace with large multinational conglomerates acting globally, and thereby becomes more expensive. Consequently, tax administrations need to strive better to promote efficiency, so fostering trust and voluntary compliance as opposed to exercising authority.

* **Full Professor, Tilburg University, The Netherlands and of counsel Deloitte. The author can be contacted at R.Russo@uvt.nl.**

** **PhD candidate, Tilburg University, The Netherlands. The author can be contacted at M.H.Martini@uvt.nl.**

1. OECD, *Study into the Role of Tax Intermediaries* p. 39 (OECD 2008).
2. Id.
3. OECD, *Co-operative Compliance: A Framework: From Enhanced Relationship to Co-operative Compliance* (OECD 2013).
4. E. Kirchler, C. Kogler & S. Muehlbacher, *Cooperative Tax Compliance: From Deterrence to Deference*, 23 Current Directions Psychol. Sci. 2, pp. 87-92 (2014).

This process is ongoing in various countries worldwide,[5] which have developed special programmes to promote a cooperative and trust-based relationship between taxpayers and tax administrations. The first countries to develop such special programmes were Australia, Ireland, the Netherlands, South Africa, the United Kingdom and the United States.[6]

On the basis of the experience of these countries, the OECD released two publications promoting the establishment of enhanced relationships,[7] later entitled cooperative compliance programmes.[8] These publications advanced the elements that are expected to be present in cooperative compliance programmes. Tax administrations should encourage behaviour that is oriented towards commercial awareness, proportionality, openness, by way of disclosure and transparency, and responsiveness, and they should implement Internal Governance Programmes (*see* section 4.3.7.).[9] Taxpayers should also behave with openness, through disclosure and transparency, and should have effective tax control frameworks (TCFs)[10] in place.

When implementing a cooperative compliance programme, countries adopt regulations and guidance, which places the programme closer to or farther from the elements considered in the foregoing paragraphs. The result is significant differences between the OECD's proposed cooperative compliance and the relationship programmes in different countries.

Despite some differences, at least one common feature is present in all of the programmes of these countries. As a rule,[11] these relationship programmes are restricted to the boundaries of one jurisdiction, thereby regulating the

5. OECD, *Tax Administration 2017: Comparative Information on OECD and Other Advanced and Emerging Economies* p. 148 (OECD 2017). In this regard, it should be noted that, out of 55 respondents to the survey, 18 countries stated that they had cooperative compliance programmes in place, and 10 that a cooperative compliance programme was in the process of being implemented.
6. OECD, *supra* n. 3, at p. 21.
7. OECD, *supra* n. 1.
8. OECD, *supra* n. 3.
9. The tax authorities must themselves have internal governance programmes.
10. OECD, *Co-operative Tax Compliance: Building Better Tax Control Frameworks* p. 7 (OECD 2016), where it is stated that: "A tax control framework (TCF) is the part of the system of internal control that assures the accuracy and completeness of the tax returns and disclosures made by an enterprise. The TCF plays a central part in bringing rigour to the co-operative compliance concept."
11. OECD, *supra* n. 3, at p. 34: "at the moment the Netherlands and the UK are the only countries who have jointly and explicitly established a co-operative compliance relationship with a large business covering a variety of different various legal/fiscal questions".

interaction between the taxpayer and the tax administration of the same country. As such, the level of tax assurance is limited if, for example, important tax risks of foreign subsidiaries cannot be covered by a local cooperative compliance programme or, if covered, are assessed unilaterally, with different criteria applied by local tax authorities and by the tax authorities of the parent company jurisdiction.

Such a jurisdictional limitation is not in line with the current worldwide reach of MNEs, which are structured internationally so as to realize the maximum value in respect of their production chains, organizing themselves throughout the countries that provide the best access to each of the factors of production, i.e. capital, entrepreneurship, labour and technology, and consumers. In addition, new technologies, which are aligned with the communication revolution, have given rise to what has been referred to as digital globalization, primarily characterized by the virtual provision of services and the sale of goods anywhere.[12]

In its 2013 Report, the OECD envisioned the need to keep:

> attention focused on opportunities for multilateral co-operative compliance; in an increasingly globalised world in which more countries are adopting co-operative compliance strategies. Increasing cross border transparency, disclosure and early certainty are of vital importance to both revenue bodies and MNEs.[13]

In January 2018, eight members[14] of the OECD Forum on Tax Administrations (FTA) initiated a multilateral cooperative risk assessment and assurance programme, i.e. the ICAP.[15] Its main purpose is to engage tax administrations and multinational enterprises (MNEs) in a cooperative, transparent and trust-based relationship to provide multilateral tax assurance with regard to the international tax risks covered. In March 2019, the second pilot[16] of the programme was launched, but now with 17 participating jurisdictions.[17]

In sections 2. and 3., this article describes the procedures and elements of the 2018 ICAP and the 2019 ICAP 2.0, respectively. In section 4., it identifies those elements of cooperative compliance that are present in the ICAP, and those that are not, in an attempt to address whether the ICAP proposal can be understood as being a multilateral formula for cooperative compliance. In section 5., some of the advantages and disadvantages of the ICAP for taxpayers and tax administrations are noted. The article then invites the reader to consider some more general conclusions regarding the ICAP in section 6.

2. The ICAP: First Pilot

2.1. In general

Action 13[18] of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project, on transfer pricing documentation and country-by-country (CbC) reporting, introduced, for the first time, standardized tax information to be produced on a global scale by MNEs. The effective exchange of this information among jurisdictions was enabled by the Multilateral Competent Authority Agreement on the Exchange of CbC Reports (CbC MCAA),[19] which was first signed by states in January 2016.[20]

The combination of the CbC reporting with the CbC MCAA, together with the common reporting standard (CRS),[21] inaugurates what the FTA refers to "an era of increased transparency" in which "new opportunities arise to use the increased flow of information to support open, co-operative relationships between taxpayers and tax administrations".[22]

In this new era, in which full transparency between taxpayers and tax administrations is a constantly expanding reality, and in which tax administrations are faced with an increasing amount of information, which now covers not only their own, but other jurisdictions as well, the ICAP is a proposal that would envisage this information being used to foster trust and collaboration between tax administrations and taxpayers. Both parties should benefit from such a trust-based and collaborative relationship. On the one hand, MNEs expect to receive assurance in relation to their tax positions.[23] On the other hand, the tax authorities

12. McKinsey Global Institute, *Digital globalization: The new era of global flows* p. 23 (McKinsey & Company 2016), available at www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows (accessed 18 Jun. 2019).
13. OECD, *supra* n. 3, at p. 88.
14. That is, Australia, Canada, Italy, Japan, the Netherlands, Spain, the United Kingdom and the United States.
15. OECD, *International Compliance Assurance Programme Pilot Handbook* (OECD 2018).
16. *See* OECD/FTA, *OECD International Compliance Assurance Programme (ICAP)* (OECD), available at www.oecd.org/tax/forum-on-tax-administration/international-compliance-assurance-programme.htm (accessed 11 Apr. 2019).
17. The original eight jurisdictions noted in *supra* n. 14, were joined by Austria, Belgium, Denmark, Finland, Germany, Ireland, Luxembourg, Norway and Poland.
18. OECD/G20, *Transfer Pricing Documentation and Country-by-Country Reporting – Action 13: 2015 Final Report* (OECD 2015), Primary Sources IBFD.
19. OECD, *Country-by-Country exchange relationships* (last updated Aug. 2019), available at www.oecd.org/tax/beps/country-by-country-exchange-relationships.htm (accessed 14 Aug. 2019) states that "as of August 2019, there are over 2200 bilateral exchange relationships activated with respect to jurisdictions committed to exchanging CbC reports".
20. *See* OECD, *Signatories of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports (CbC MCAA) and Signing Dates* (last updated 6 Aug. 2019), available at www.oecd.org/tax/automatic-exchange/about-automatic-exchange/CbC-MCAA-Signatories.pdf, (accessed 14 Aug. 2019).
21. OECD, *Implementation of Tax Transparency Initiative Delivering Concrete and Impressive Results*, OECD (7 June 2019), available at www.oecd.org/ctp/exchange-of-tax-information/implementation-of-tax-transparency-initiative-delivering-concrete-and-impressive-results.htm (accessed 14 Aug. 2019), says that, under the common reporting standard, "information on 47 million offshore accounts" has been exchanged, "with a total value of around EUR 4.9 trillion", making it the "largest exchange of tax information in history".
22. OECD, *International Compliance Assurance Programme – ICAP Operating Manual 2017*, CTPA/CFA/FTA(2017)5/REV 2 (OECD 2017), p. 2. For further information, *see* J.M. Calderón Carrero, *The OECD International Compliance Assurance Programme: Just a New Multilateral and Cooperative Model of Tax Control for Multinational Enterprises?*, 72 Bull. Intl. Taxn. 12 (2018), Journal Articles & Papers IBFD.
23. OECD, *supra* n. 15, at p. 7, where it is stated that: "ICAP does not provide an MNE group with legal certainty as may be achieved, for example, through an advance pricing agreement, but gives assurance where tax administrations participating in the programme consider a risk to be low".

expect to realize a more efficient allocation of resources by concentrating their efforts on high-risk taxpayers.

The first ICAP pilot was initiated in January 2018 and involved the following eight jurisdictions: Australia, Canada, Italy, Japan, the Netherlands, Spain, the United Kingdom and the United States. Seven[24] MNEs, the names of which were not disclosed, were selected from what were perceived to be low-risk taxpayers and invited to join the programme by the participating tax administrations. The programme covered 2016 and 2017 and assurance could be provided by tax administrations also for the following two filing periods.

The 2018 ICAP Pilot Handbook listed the following six drivers: (i) better and more standardized information for transfer pricing risk assessment; (ii) a global mutual agreement procedure (MAP) review; (iii) well-established MNE compliance frameworks; (iv) advances in international collaboration; (v) providing a pathway to improved tax certainty for low or medium risk MNE groups; and (vi) capitalizing on the multilateral context to provide greater certainty for MNEs and tax administrations.[25] It also indicated the following four anticipated benefits of the programme: (i) MNE groups would have the opportunity to "talk through their CbC reports and provide additional clarity"; (ii) MNE groups would "engage with several tax administrations simultaneously"; (iii) tax administrations, by working together, would "have a comprehensive picture of the MNE group`s cross-border activities", providing multilateral tax assurance; and (iv) potential disputes could be solved at an early stage, preventing the MAP process from starting.[26]

In the 2018 ICAP Pilot Handbook, the scope was restricted to transfer pricing and permanent establishment (PE) risks, with the additional statement that "following the pilot, future ICAP risk assessments may also cover other relevant or material international tax risks".[27] In the 2019 ICAP Pilot Handbook 2.0, the possibility for other risks to be covered was restored,[28] as originally suggested by the 2017 ICAP Operating Manual[29] (*see* section 3.1.). In this context, the 2017 ICAP Operating Manual contains a list of transfer pricing risks[30] and indicators of PE risks that were included in neither the 2018 ICAP Pilot Handbook nor the 2019 ICAP Pilot Handbook 2.0. In addition, the 2018 ICAP Pilot Handbook was structured in the following four phases: (i) initial phase (*see* section 2.2.1.); (ii) level 1 risk assessment (*see* section 2.2.2.); (iii) level 2 risk assessment (*see* section 2.2.3.); and (iv) outcome letter (*see* section 2.2.4.).

2.2. The stages of the 2018 ICAP

2.2.1. Initial phase (six weeks)

The first event was an invitation from the participating tax administrations to the MNE to provide a standard package of information.[31] The MNE could either send the package directly to each of the participating tax administrations or, alternatively, to the lead tax administration, which, in turn, would share it with the other participating tax administrations. That choice would ultimately depend on how easy the lead tax administration could, using the exchange of information instruments in place, share the information package with the other tax administrations. If the MNE itself sent the package of information directly to each of the participating tax administrations, such an action would speed up the process, as it would not be necessary to exchange information.

Approximately five weeks after the standard package of information was delivered, the tax administrations would hold a pre-risk assessment workshop to discuss the information received. One week after the pre-risk assessment workshop, there would be a kick-off meeting with all the participating tax administrations and the MNE. On that occasion, the MNE had an opportunity to provide clarification regarding the documentation delivered and to answer questions from the tax administrations.

2.2.2. Level 1 risk assessment (eight weeks plus four or eight weeks)

In this phase, "covered tax administrations would work together collaboratively within a coordinated process"[32] to review, in a joint workshop with all participating tax administrations, three issues. These issues are: (i) the MNE presentation made in the kick-off meeting; (ii) the information package provided; and (iii) any further information already held by the tax administrations. The covered tax administrations would jointly make two risk assessments. First, with regard to the MNE group's risk categorization; and, second, with regard to the risks covered by the programme.

Each tax administration was free to use its own domestic policies, practices and risk assessment methods, which could result in the tax administrations reaching conflicting risk assessment conclusions. The relevant guidance

24. B. Heidecke & L. Slagter, *The International Compliance Assurance Programme and Joint Audits: A New Epoch of Transfer Pricing Tax Audits?*, 25 Intl. Transfer Pricing J. 3, sec. 3.1. (2018), Journal Articles & Papers IBFD.
25. OECD, *supra* n. 15, at p. 8.
26. Id., at p. 9.
27. Id., at p. 11.
28. OECD, *International Compliance Assurance Programme Pilot Handbook 2.0*. p. 18 (OECD 2019).
29. OECD/FTA, *supra* n. 22, at p. 14.
30. Id., at Annex II, pp. 37-39, lists the following TP and PE risks: Transfer pricing risks: profitability indicators and known economic activities; material cross-border transactions with related entities; persistent losses; location of profit generating activities and where such profits are reported. Permanent establishment risks: to operate in another country either continuously or by regularly returning to it; to operate through an agent or independent agent; using on-line concluded contracts; long term projects; extraction of natural resources project; mismatch between the PE economic activity, functions, assets or risks and the profits allocated to it; engagement of material transactions with related entities; persistent losses.
31. OECD, *supra* n. 15, at pp. 23-25 enumerate the following documents to be provided in the initial ICAP documentation package: CbC report; Master File; Local Files; group's tax strategy and tax control framework; consolidated financial statements; standalone financial statements; information regarding uncertain tax positions; global business structure; conciliation of financial statements and income tax returns; a value chain analysis; permanent establishment documentation; supporting transfer pricing documentation.
32. Id., at p. 14.

can be found in the OECD Handbook on Effective Tax Risk Assessment.[33] Nevertheless, within the spirit of the ICAP, it is precisely this kind of situation in which the coordinated efforts of the covered tax administrations played a decisive role and represented the greatest advantage of the ICAP. Agreement would have to have been reached multilaterally before any conflicting conclusions could be reached. If that was not possible, a MAP should have been started.

There were three possible outcomes to the Level 1 risk assessment: (i) the assessment of the risks as low, or no risks, could be made conditional on specific changes in the tax filing, starting with a "risk assurance" phase, to be concluded within three weeks; (ii) no further action would be needed because risks could be assessed as low, or as no risk; or (iii) a Level 2 risk assessment would have to be initiated to provide further information or discussion (*see* section 2.2.3.). It was not clear whether it could be concluded, already in Level 1, that it would not be possible to assess the MNE as low or no risk without moving to a Level 2 risk assessment.

2.2.3. Level 2 risk assessment (approximately five months)

The objective of the Level 2 risk assessment was to perform a "more detailed and comprehensive review"[34] of the information provided and risks covered. Three outcomes were possible: (i) the covered risks could be assessed as low or no risk; (ii) tax administrations could find that changes in the tax filing were needed, and a risk assurance phase could be initiated; (iii) it could prove impossible to assess the risks as low or no risk, and the process could not move on to providing tax assurance.

2.2.4. Outcome letter (three weeks)

Within three weeks after the risk assessment phase had been concluded, each covered tax administration separately prepared an outcome letter confirming its findings, with the content, form and wording as prescribed by its domestic legislation practices and requirements.[35] The outcome letter considered the steps followed in the risk assessment phase and in the assurance phase. It set out the risks covered that were regarded as low or no risks, the conditions, caveats and limitations of the assurance, and the period for which the assurance was valid.

The risks that could not be assured as low or no risk would be dealt with in accordance with the proceedings and solutions available in the relevant jurisdictions. In order to confirm that the process had ended, the lead tax administration issued a completion letter, which was the final ICAP communication.

33. OECD, *Country-by-Country Reporting Handbook on Effective Tax Risk Assessment* (OECD 2017).
34. OECD, *supra* n. 15, at p. 16.
35. Id., at p. 17.

3. The ICAP: Second Pilot

3.1. In general

The 2019 plenary meeting of the FTA was held in March 2019 in Santiago, Chile. In addition to the eight original jurisdictions, i.e. Australia, Canada, Italy, Japan, the Netherlands, Spain, the United Kingdom and the United States, nine more joined the second pilot of the ICAP, i.e. Austria, Belgium, Denmark, Finland, Germany, Ireland, Luxembourg, Norway and Poland.

Delivering tax certainty and improving cooperation were high on the agenda among the four priorities announced at the meeting.[36] Both the 2019 ICAP Pilot Handbook 2.0[37] and the report on Joint Audit 2019[38] were released on this occasion.

The same drivers listed in the 2018 ICAP Pilot Handbook were confirmed in the 2019 ICAP.[39] In addition, the 2019 ICAP Pilot Handbook 2.0 included "co-operative relationships between MNEs and tax administrations"[40] as an anticipated benefit, which was not originally listed in the 2018 ICAP Pilot Handbook.

The 2019 ICAP Pilot Handbook 2.0 listed four improvements from the first pilot. These improvements were: (i) the decision no longer to divide the risk assessment into Levels 1 and 2; (ii) the introduction of a scoping stage, with the intention of avoiding a situation in which the MNEs provide information regarding transactions that fall outside of the scope of the risk assessment; (iii) the possibility to resolve issues during the risk assessment stage; and (iv) the likelihood that MNEs "will be able to obtain comfort over a greater proportion of their operations" as even more jurisdictions are likely to join the ICAP in the future.[41]

While the 2018 ICAP was available only to a few invited MNEs, the second pilot allowed any MNE to apply for it, but any application had to be made before 30 June 2019.[42] Tax administrations look at the following six factors to decide if an MNE is suitable for the programme: (i) whether the ultimate parent entity of the group is resident in the jurisdiction of a participating tax administration; (ii) the volume and materiality of an MNE's transactions in the participating jurisdictions; (iii) whether CbC reports had been filed as of 1 January 2016; (iv) whether there is a group tax strategy at board level and adequate internal structures; (v) whether there is an effective TCF in place; and (vi) whether the MNE is committed to engaging cooperatively and transparently.[43] It should be

36. OECD/FTA, *2019 FTA Santiago Communique* (OECD 2019), available at www.oecd.org/tax/forum-on-tax-administration/events/forum-on-tax-administration-communique-2019.pdf (accessed 11 Apr. 2019).
37. OECD, *supra* n. 28, at p. 8, where it is stated that the ICAP "does not provide an MNE with the type of legal certainty that may be obtained through other bilateral or multilateral routes, such as a bilateral or multilateral APA, simultaneous or joint tax audit or MAP/arbitration".
38. OECD/FTA, *Joint Audit 2019 – Enhancing Tax Co-operation and Improving Tax Certainty* (OECD 2019).
39. OECD, *supra* n. 28, at pp. 5-6.
40. Id., at p. 7.
41. Id., at p. 10.
42. OECD/FTA, *supra* n. 16.
43. OECD. *supra* n. 28, at p. 15.

noted that these factors are all viewed from the perspective of the domestic legislation of each of the participating tax administrations, which may result in a situation, for example, in which one tax administration has stricter criteria than the others.

It is anticipated that the lead tax administration will be that of the jurisdiction where the ultimate parent entity resides. However, if the ultimate parent entity is in a non-participating country, or if the tax administration is from a participating country but it is not willing to be the lead tax administration, it is possible for the MNE to approach the tax administration of another jurisdiction to act as a surrogate lead tax administration (*see* section 5.3. for discussion of the need to justify the decision to opt out). The 2019 ICAP 2.0 also introduced the shadow single point of contact, i.e. a competent authority able to act on behalf of the single point of contact, as the situation demands. These are innovations introduced by the 2019 ICAP Pilot Handbook 2.0.

Within the multilateral context of the ICAP, where information is simultaneously shared in multilateral video conferences, telephone conversations and even in virtual data rooms, it is desirable that effective exchange of information instruments are in place between the participating jurisdictions, such as tax treaties, the Multilateral Convention for Mutual Administrative Assistance in Tax Matters[44] and tax information exchange agreements (TIEAs).[45] The 2019 ICAP Pilot Handbook 2.0 introduced the suggestion to use a secure virtual data room as the preferred approach to sharing information.[46] Such a procedure would permit all of the covered tax administrations and the MNE to have simultaneous and instant access to the same information.

3.2. The stages of the 2019 ICAP 2.0

3.2.1. Pre-entry

The pre-entry stage permits MNEs to evaluate whether they could benefit from the ICAP and for tax administrations to decide whether they would be willing to participate in the risk assessment and assurance of that MNE. For these purposes, the MNE shares high-level information, such as that requested in the ICAP standard template, which includes: (i) a list of potentially covered tax administrations; (ii) a list of proposed covered periods; (iii) the identity of the main MNE entity in the covered jurisdictions; and (iv) information concerning any transactions, arrangements or restructuring in the past 12 months.[47] In addition, the MNE also provides an overview of the covered risks, i.e. PE risks, transfer pricing risks and any further risks to be covered. The proposed covered period must comprise fiscal years, beginning as of 1 January 2016, in respect of which the CbC report has been filed (*see* section 5.1. for further discussions on the documentation).

Finally, a single deadline for joining the pre-entry stage was stated on the OECD website,[48] i.e. 30 June 2019. That was a very tight deadline, considering that the second pilot was announced on 28 March 2019.

3.2.2. Scoping (four to eight weeks)

Potentially, any internationally related risks can fall within the scope of the ICAP, as noted below:

> [The] ICAP is suitable for dealing with a broad spectrum of international and cross-border tax risks, but is likely to be most effective where it is targeted at those risks that are a concern to all or most of the tax administrations involved... [T]ax risks that may be covered include:
> – transfer pricing risk
> – permanent establishment risk
> – other categories of international tax risk... (e.g. hybrid mismatch arrangements, withholding taxes and treaty benefits etc.).[49]

Whereas in the pre-entry stage only ICAP templates are provided, the scoping stage requires the following four documents: (i) the CbC report; (ii) the Master File; (iii) details of the global group structure; and (iv) advanced pricing agreements (APAs) and rulings. The pre-entry covered risks overview must be complemented by indicating the value of the transactions.

Under the scoping stage, which did not exist in the first ICAP pilot, the idea is that tax administrations should already decide "whether any transactions should be excluded from the scope of the MNE's ICAP risk assessment"[50] and, in this way, avoid the delivery of information for transactions that are not within the scope of the risk assessment. Tax administrations also consider the timeframe and eventual changes to the main documentation package. Next, the lead tax administration shares with the MNE the outcome of the discussion carried out between tax administrations. The MNE is then asked to decide whether it wishes to continue with the ICAP risk assessment.[51]

3.2.3. Risk assessment and issue resolution (no more than 20 weeks)

This stage starts with the delivery of the main documentation package by the MNE. This package is very broad, not limited to the items described in the handbook,[52] and basically realizes the full transparency pillar. While the information package to be delivered in the scoping stage primarily consists of documents that are readily available, such as the CbC report, the Master File, the Local Files, the group structure, the identification of entities and activities per jurisdiction and APAs and tax rulings, in the risk assessment stage the information package requires the updating of information that has been delivered previ-

44. OECD and Council of Europe, *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol* (OECD 2011).
45. OECD. *supra* n. 28, at p. 17.
46. Id., at p. 23.
47. OECD, *supra* n. 28, pp. 39-40.
48. OECD/FTA, *supra* n. 16.
49. OECD, *supra* n. 28, at p. 18.
50. Id., at p. 24.
51. Id., at p. 13.
52. Id., at pp. 40-42.

ously and some information produced specifically for the ICAP (*see* section 5.1.).

Approximately four weeks after the delivery of the main documentation package, a series of multilateral telephone conversations and meetings between the tax administrations is organized by the lead tax administration to discuss the documentation provided, the initial findings derived from the covered tax administrations, further information that the covered tax administration might hold about the MNE from other sources and expectations regarding the outcome of the risk assessment.[53]

It is expected that the MNE is to be included in at least one of the multilateral video conferences or telephone conversations with the covered tax administrations to discuss issues, such as the documentation that has been made available, doubts that have arisen between the covered tax administrations and, ultimately, the identification of the transactions to facilitate the resolution of an issue. There is the possibility to have more video conferences or telephone conversations, whether multilateral or between some of the covered tax administrations, to clarify and discuss further any aspect of the risk assessment process.

As noted in section 2.2.2., each tax administration is free to use its own domestic policies, practices and risk assessment methods. Moreover, any covered tax administration can suggest starting an issue resolution process in respect to one or more transactions, with the objective of applying any necessary measures that ultimately permit the tax administration to assess the transaction as low or no risk.

3.2.4. Outcomes (four to eight weeks)

The lead tax administration issues a completion letter informing the MNE that the ICAP risk assessment has been finalized. The MNE also receives outcome letters from each of the covered tax administrations, with the results of the risk assessments and assurance of the covered risks.

The content of the outcome letters follows the domestic regulations of each tax administration. However, it is expected to contain: (i) risk ratings or a description of key findings; (ii) where an issue resolution has been started, the agreement reached; and (iii) the covered risks that have been assessed as low or no risk, together with a statement that these risks are not expected to be further reviewed; and (iv) any caveats or limitations.[54]

4. Is the ICAP an Attempt to Introduce an International and Multilateral Cooperative Compliance Regime?

4.1. Defining cooperative compliance for the purposes of the comparison

Comparing cooperative compliance with the ICAP can be problematic if it is not first established which cooperative compliance definition is to be used for the purposes of that comparison. There is not yet a commonly accepted definition of cooperative compliance. Evidence for that statement can be found in the two different OECD/FTA publications of 2013 and 2017.

In the 2013 OECD report,[55] in which the members of the Large Business Network responded to a survey representing 21 countries, it was noted that Austria, Canada, Denmark, South Africa and Sweden were jurisdictions in which cooperative compliance regimes were in place in 2012. The 2017 OECD report,[56] in which the survey was replied to by 55 tax administrations, found different conclusions regarding these same countries. It affirmed that none of them had a cooperative compliance programme in place neither in 2014 nor in 2015, and that Austria, Denmark and Sweden were only implementing programmes in 2014-2015. Unless those countries abandoned their cooperative compliance programmes between 2012 and 2014-2015, the most likely explanation for the conflicting replies is the lack of a common understanding of a definition of cooperative compliance.

While the OECD has advanced the pillars of cooperative compliance programmes, there remains important leeway as to how to implement those elements, especially if the specific mechanisms adopted can achieve the fulfilment of the underlying pillars of trust, transparency and cooperation. Although justifiable within the context of the OECD, as strict parameters and guidance would not be compatible with the different cultures of its members,[57] the freedom in how to implement a cooperative compliance programme results in very different programmes claiming to be cooperative compliance. Having said the foregoing, for the purposes of the present study the authors adopt the pillars put forward by the OECD in its 2008[58] and 2013[59] publications to compare cooperative compliance with the ICAP.[60]

4.2. The pillars of cooperative compliance

Cooperative compliance begins from the idea, empirically confirmed,[61] that the level of voluntary compliance increases if a trust-based relationship between taxpayers and tax administrations is in place. Trust is, therefore, the starting point from which cooperative compliance emerged. But how to build that trust? It is not the intention of the authors to answer that question conclusively, but there are at least two other pillars which can clearly be identified as indispensable in permitting trust to be created.

First, it is not possible to build trust in something that is not understood. Consequently, it can be inferred logi-

53. Id., at p. 26.
54. Id., at p. 29.
55. OECD, *supra* n. 3, at pp. 22-24.
56. OECD, *supra* n. 5, at pp. 294-295.
57. OECD, *supra* n. 3, at p. 3.
58. OECD, *supra* n. 1.
59. OECD, *supra* n. 3.
60. For a similar methodology of investigation, which compared cooperative compliance with the Dutch Horizontal Monitoring model, *see* E. Huiskers-Stoop & H. Gribnau, *Cooperative Compliance and the Dutch Horizontal Monitoring Model*, 5 J. Tax Administration 1, pp. 66-110 (2019).
61. Kirchler, Kogler & Muehlbacher, *supra* n. 4.

cally that the parties to the relationship only trust in each other if transparency exists. This situation entails that, from the perspective of the taxpayer, all available information is shared, including the taxpayer's intentions regarding tax planning and tax structures. On the other hand, tax administrations should be transparent regarding their audit plans, their assessment of ongoing transactions and operations shared with them and their intentions as to how they will to use the information they receive.

Second, especially concerning the complex tax environment of large MNEs, the parties must be willing to walk each other through all the information that is shared. Otherwise transparency may not have any effect at all, as too much complex information can be misleading and result in no real understanding of the facts and circumstances. Accordingly, cooperation is indispensable in ensuring that transparency results in real understanding by both parties and, therefore, promotes a relationship in which trust can be built.

The other elements listed in the OECD publications are derived from these three core pillars, that is: (i) trust; (ii) transparency; and (iii) co-operation. In its 2008 study on the role of tax intermediaries, the OECD described the following behaviours that tax administrations should encourage to promote enhanced relationships: (i) commercial awareness; (ii) proportionality; (iii) openness, through disclosure and transparency; and (iv) responsiveness. On the other hand, taxpayers should provide disclosure and transparency. By adopting those behaviours, a "more collaborative, trust-based relationship" between taxpayers and tax authorities should emerge. This situation was referred to as the "enhanced relationship", which should favour "collaboration over confrontation" and be "anchored more on mutual trust than on enforceable obligation".[62]

In its 2013 cooperative compliance publication, the OECD stressed the importance of TCFs, which are the basis for justified trust.[63] It also highlighted the importance of internal governance programmes (*see* section 4.3.7.) within revenue bodies, both in enhancing relationships with taxpayers and creating counterbalance mechanisms to mitigate any problems that might arise from the new relationship models.

4.3. Is the ICAP the first attempt to implement cooperative compliance at an international and a multilateral level?

4.3.1. The pillars of trust, transparency and cooperation

The ultimate goal of cooperative compliance, as espoused by the OECD, is to create a relationship that favours "collaboration over confrontation, and is anchored more on mutual trust than on enforceable obligations".[64] Consequently, collaboration and trust, together with transparency, are by definition the starting pillars of cooperative compliance.

Transparency and cooperation are the necessary conditions to enter the ICAP, as only MNEs "willing to commit to engaging co-operatively and transparently",[65] are suitable for the programme. Transparency is primarily evidenced by the documentation packages that MNEs must deliver in each phase, i.e. pre-entry information, scoping documentation package and the main documentation package, and any further information requested by covered tax administrations as the supplementary documentation. MNE cooperation is evidenced by participation in video conferences, telephone conversations, meetings and presentations as may be necessary and by making the right personnel available for the process. The anticipated result from these behaviours is that trust should emerge in the relationship: "As a result of participation in the programme, a relationship of mutual trust based on reciprocal openness and good faith may be generated".[66]

4.3.2. Commercial awareness

Commercial awareness, such as that described in the 2008 OECD publication, requires tax administrations to acquire knowledge about "the broad context within which large corporate taxpayers operate" in respect of the industry in which the taxpayers operate and the particular taxpayer's business.[67] Tax administrations should acquire that knowledge based on their daily interactions with taxpayers and their advisers, and by education and training.[68]

Under the ICAP, tax administrations have the opportunity to obtain commercial awareness. In the scoping documentation package, they should receive a description of activities in each of the proposed covered jurisdictions.[69] Included in the information are "details of the MNE's tax strategy", "a value chain analysis... comprising an explanation... of the external and internal profit drivers" with an indication of the "five largest product and service offerings".[70] In addition, the risk assessment itself is an activity which requires commercial awareness, as is suggested in the Pilot Handbook.[71]

Nevertheless, it does not seem that commercial awareness is demanded from tax administrations as a requirement of the ICAP. It is certainly desirable and expected, especially to guarantee a fair and effective risk assessment.

4.3.3. Proportionality

The intensity with which tax administrations exercise their discretionary powers should be tempered in pro-

62. OECD, *supra* n. 1, at p. 39.
63. OECD, *supra* n. 3, at p. 87.
64. OECD, *supra* n. 1, at p. 39.
65. OECD, *supra* n. 38, at p. 15.
66. OECD, *supra* n. 28, at p. 7.
67. OECD, *supra* n. 1, at pp. 34-35.
68. Id., at pp. 69-71.
69. OECD, *supra* n. 28, at p. 40.
70. Id., at p. 41.
71. Id., at p. 18, where it is stated that: "The assessment of covered risks requires an understanding of an MNE's global value chain and tax policies, including activities in jurisdictions other than those of covered tax administrations".

portion to the aim that is pursued. Within the context of cooperative compliance, this means that tax administrations should target the use of their auditing powers at situations where relevant risks are perceived:

> Proportionality is about the choices revenue bodies make in allocating resources, deciding which taxpayers, which tax returns and which tax issues to prioritise and how to respond appropriately.[72]

Within the ICAP, proportionality also applies. If the covered risks are assured, the covered tax administrations provide comfort that it is not anticipated "that compliance resources will be dedicated to a further review of covered risks for a defined period".[73]

4.3.4. Openness (disclosure and transparency)

Openness, through disclosure and transparency, applies both to taxpayers and tax administrations. From the taxpayer's perspective, it is expected that tax administrations will share their risk management strategies, how they choose taxpayers, and the behaviours and transactions to be audited.[74] From the tax administration's perspective, it is necessary that "taxpayers... agree to go beyond compliance with their statutory reporting obligations".[75]

Openness is a requirement to be admitted to the ICAP and to continue to be party in the programme.[76] In particular, MNEs must be:

> willing to commit to engaging co-operatively and transparently throughout the ICAP process, including by: participating in open and frank discussions with tax administrations; providing documentation and information in a timely manner; being open with respect to areas of uncertainty and the positions it takes in these areas; working pro-actively towards resolving issues that arise.[77]

4.3.5. Responsiveness

Under the OECD cooperative compliance framework, it is expected that the tax authorities will react effectively to the taxpayer's inquiries and demands. In other words:

> Taxpayers should receive prompt, efficient and professional responses when they make requests of revenue bodies. They can also expect a fair and efficient decision-making process and definitive resolution of issues.[78]

That pillar of responsiveness can also be found in the ICAP, where the phases are expected to be concluded within specific timeframes, i.e. the scoping phase within four to eight weeks, risk assessment in 20 weeks and outcomes in four to eight weeks, to be agreed upfront between tax administrations and the MNE. The ICAP steering group[79] is a resource to resolve issues where the response from tax administrations is not prompt, efficient or professional, thereby ensuring that the responsiveness pillar is effective.[80]

4.3.6. Taxpayer TCFs

It is the responsibility of the board to be in control of the company's tax positions. That obligation derives from corporate governance regulations and should be complied with irrespective of cooperative compliance or the ICAP. That is:

> corporate governance codes, amongst others, regulate the responsibilities of the board and supervisory board (or non-executive directors). The responsibilities include having and supervising the policies of the company and controlling the risks in the company.... Taxes are also one of the risks to be controlled and managed and to be reported upon in the commercial accounts.[81]

The existence of a TCF in place is of fundamental importance to cooperative compliance. First, the tax authorities can begin from the existing TCF in auditing the company, thereby achieving important efficiency and saving resources.[82] Second, it creates the grounds for justified trust, as, by verifying the soundness and effectiveness of the TCF, tax administrations can objectively assess their level of trust.[83] Third, it provides objective discrimination criteria for selecting taxpayers eligible for the programme.[84]

The ICAP makes the existence of an effective TCF at global level a requirement to be admitted to the programme.[85] The MNE must provide a description of "how the effectiveness of this framework is managed and monitored in general and how it is managed and monitored specifically with respect to the covered risks".[86]

4.3.7. Tax administrations: Internal governance programmes

Cooperative compliance raises some concerns. These concerns include: (i) tax authorities may start to accept aggressive tax planning in order to maintain good relationships with taxpayers; (ii) MNEs may be placed in a position of competitive disadvantage if they give up tax planning that other MNEs continue to implement; (iii) information asymmetry may exist; and (iv) there is the risk of attachment or regulatory capture.[87] Consequently, tax administrations should institute counterbalancing mechanisms to mitigate such risks.

72. Id., at p. 35.
73. Id., at p. 8.
74. OECD, *supra* n. 1, at p. 37.
75. OECD, *supra* n. 3, at p. 21.
76. OECD, *supra* n. 28, at p. 44: "However, in cases of serious or persistent failure to fulfil its role, a tax administration or MNE may be excluded from the programme."
77. Id., at p. 15.
78. OECD, *supra* n. 1, at p. 37.
79. OECD, *supra* n. 28, at p. 44, where it is stated that the steering group "includes a senior representative from each participating tax administration" and is "responsible for stewardship decisions and providing strategic oversight, as well as compliance with each tax administration's own internal governance procedures. The steering group is the escalation point for any disputes concerning the ICAP process that require resolution, between an MNE and the covered tax administrations, or between covered tax administrations."
80. Id., at p. 44.
81. R. Russo & J. van Trigt, *Corporate Governance and Taxes*, in *Tax Assurance* pp. 27-28 (R. Russo ed., Wolters Kluwer 2015).
82. R. Veldhuizen, *Cooperative Compliance: Large Businesses and Compliance Management*, in *Tax Assurance* pp. 160-161 (R. Russo ed., Wolters Kluwer 2015).
83. OECD, *supra* n. 3, at p. 87.
84. Id., at p. 47.
85. OECD, *supra* n. 28, at p. 15.
86. Id., at p. 41.
87. OECD, *supra* n. 3, at pp. 65-66.

Within the ICAP, the Steering Group is expected to serve as such a counterbalancing mechanism by supervising the ICAP phases and procedures, by settling eventual disputes and by providing governance and coordination at an international and multilateral level.[88] But that does not replace governance programmes that are expected to exist within tax administrations at domestic level.

4.4. Main differences between cooperative compliance and the ICAP

4.4.1. In general

Cooperative compliance is intended to resolve issues in real time,[89] meaning that tax administrations may even be called to consider transactions that have not yet occurred and, in every case, transactions that have not yet been reported in the MNE's tax returns. In contrast, the ICAP examines transactions that have already been carried out and have been reported in the relevant CbC report.[90]

Differently from the ICAP, the duration of cooperative compliance programmes and the periods covered by them are not limited to the fiscal years reported in CbC reports. Neither the assurance, nor the provision of a higher level of certainty, are limited to the following two years, as is the case with the ICAP.

Cooperative compliance programmes are, in "the majority of countries", formalized between taxpayers and tax authorities in a legal instrument, for example, agreements, covenants, memoranda of understanding (MOU) and gentleman's agreements.[91] Non-compliant taxpayers can be subject to penalties that are different from regular statutory penalties. With regard to the ICAP, the pilot handbooks do not provide for instruments to be executed between a taxpayer and the tax administration, and the consequence of non-compliance is exclusion from the programme.[92]

Accordingly, the scope of the ICAP is limited to international tax-related matters, while cooperative compliance covers any tax-related risk (*see* section 3.2.2.). While cooperative compliance targets providing an increased level of certainty,[93] the ICAP provides assurance.[94] This position is an important difference. If the ICAP could provide certainty, MNEs would be more inclined to invest in implementing a TCF and join the programme.[95]

4.4.2. Advantages and disadvantages of the ICAP

From the perspective of taxpayers, by joining the ICAP, five advantages can be anticipated. These advantages are (i) benefiting from higher tax assurance; (ii) having more reliable tax positions; (ii) saving resources, for example, by way of reducing expenses with tax consulting, tax audits and tax litigation; (iv) reducing reputational risks; and (v) having fewer tax assessments.

On the other hand, four disadvantages can be envisioned. These disadvantages are: (i) encountering costs and uncertainties relating to the implementation of the TCF; (ii) giving wide exposure to sensitive information, consisting, for example, of tax strategies and value chains; (iii) in practice, waiving the possibility to have tax issues covered by the statute of limitation (*see* section 5.2.); and (iv) having little time in which to deliberate and make a decision to join the programme (*see* section 3.2.).

Tax administrations expect to benefit from two developments. These developments are: (i) taxpayer cooperation and disclosure of information going beyond statutory obligations; and (ii) realizing the effective deployment of their resources by freeing them up to target high-risk taxpayers.

5. Present and Future Challenges for the ICAP

5.1. Are the documentation packages too burdensome?

MNEs must provide three sets of documentation packages, one for each of the stages of the ICAP, i.e. pre-entry information, the scoping documentation package and the main documentation package. If requested by any of the covered tax administrations, supplementary documentation must also be provided.

Information to be provided by MNEs within the ICAP can be grouped into four categories, These categories are: (i) information readily available to be provided in any format; (ii) information readily available to be provided in the ICAP templates; (iii) information not readily available and to be provided in any format; and (iv) information not readily available to be provided in the ICAP templates.

With regard to each of these groups, MNEs have different administrative burdens in preparing and delivering information. Completing the pre-entry template, for example, may be quite time-consuming, as MNEs must make a risk assessment in respect of each of the proposed jurisdictions.[96] Further details must be provided regarding

88. OECD, *supra* n. 28, at p. 44, where it is stated that "[t]he steering group is the escalation point for any disputes concerning the ICAP process that require resolution".
89. Id., at pp. 20, 46 and 35.
90. Id., at p. 15. This is a suitability criterion, that is: "whether CbC reports are available for fiscal years commencing on or after 1 January 2016".
91. OECD, *supra* n. 3, at p. 31.
92. OECD, *supra* n. 28, at p. 44.
93. OECD, *supra* n. 3, at p. 83, where one benefit is stated to be: "[g]reater certainty in relation to tax exposure"; *see also* p. 49: "In connection with rulings, some businesses have commented that revenue bodies should take care that levels of certainty in co-operative compliance should not be less than can be obtained through formal rulings: should co-operative compliance provide less certainty, then there is less incentive for business to engage."
94. OECD, *supra* n. 28, p. 8, where it is stated that: "ICAP does not provide an MNE with the type of legal certainty that may be obtained through other bilateral or multilateral routes, such as a bilateral or multilateral APA, simultaneous or joint tax audit or MAP/arbitration".
95. It should be noted that legal certainty should only be granted when the facts and operations have been analysed and verified, while assurance is granted on the basis of the internal controls of MNEs. Such a situation means that, as long as the internal controls of MNEs are effective, tax administrations can trust that the output from those controls are accurate and, therefore, represent low or no risk.
96. OECD, *supra* n. 28, at p. 39, which lists, as part of the pre-entry covered risk overview, "an indication as to whether each of these categories of transaction or arrangement poses a potential risk to the jurisdiction of each proposed covered tax administration".

that information by way of "an indication of value" in the scoping documentation stage. Most of the work is carried out in preparing the main documentation package, where very detailed information, not often readily available, is required, such as a risk-assessment per country, details of the MNE's tax strategy, a value chain analysis, indicating, for example, profit drivers and largest products, and a detailed risk-assessment regarding PEs and transfer pricing.

Despite those difficulties, MNEs should be able to provide the requested information without major concerns. This situation is the case especially considering that, to be eligible for the ICAP, MNEs must have in place an effective TCF, which should mean, at least, that they are in control of their tax-related information.

However, it must be noted that "to provide information" differs from "updating information". The ICAP requires MNEs to constantly update information. First, when the pre-entry information is delivered, the MNE must say if "any transaction, arrangement or re-structuring has taken place in the last 12 months which may mean that information currently held by a proposed covered tax administration is out of date".[97]

First, there are at least two issues with that obligation. These issues are: (i) "any transaction, arrangement or re-structuring" is so broad that it means that information must be provided regarding anything that happened in the previous 12 months; and (ii) "information currently held" by tax administrations is difficult to delimit, as tax administrations may have not only information regularly provided by the MNEs, but also information gathered from other sources, which, of course, cannot be known by MNEs. This position gives rise to numerous uncertainties, which could be resolved by placing on the tax administrations the obligation to indicate what information must be updated.

Second, the main documentation package requires all documents delivered in the scoping documentation package to be updated.[98] Here, it should be noted that the update is not limited to the past 12 months, meaning that information must be updated from its origin. Such a requirement consumes a considerable amount of time and resources as documentation such as the CbC report, the Master File and the Local Files, for example, are usually updated on a different timeframe and therefore require MNEs to engage external service providers to perform this task.

Third, MNEs must notify covered tax administrations of "any actual or expected material changes to their business that may impact the covered risks or the outcomes of the ICAP risk assessment".[99] This obligation requires specific controls to be implemented.

97. Id., at p. 39.
98. Id., at p. 40.
99. Id., at p. 19.

5.2. Exchange of information and its use for other purposes

The 2019 ICAP Pilot Handbook 2.0 provides that the information package can: (i) be shared through a secure virtual data room with all covered tax administrations; or (ii) be sent to the lead tax administration which, in turn, shares it with the other participating tax administrations.[100] Although a taxpayer is bound[101] by the pillars of transparency and cooperation, and, in principle, should voluntarily share all of the available information beyond its legal obligations, it must still be observed that the information to be exchanged multilaterally within the ICAP has, at least, four different natures, and, therefore, would not always be covered by the same exchange instrument.

First, there is the CbC report and the related documentation, the automatic exchange of which is well supported by the CbC MCAA,[102] with the only country not party to it being the United States. Second, there is information that falls outside the scope of the CbC report, but which the taxpayer is still legally obliged to share with its local tax administration. Third, there is information that the taxpayer is not legally obliged to share with its local administration, but which the taxpayer shares in acting within the spirit of the ICAP. Finally, there is information of a fourth nature, which is the information not shared by the taxpayer with its local tax administration, but to which the local tax administration had access through other means and potentially could exchange with other tax administrations within the ICAP.

In the second set-up, where the taxpayer shares the information package only with the lead tax administration, there is information the exchange of which is not covered by the CbC MCAA and should be exchanged under the legal framework of another available exchange instrument. This position may give rise to practical complications, especially considering that tax administrations who opted out the ICAP programme can still use that information, received through the ICAP, to carry out domestic investigations and assessments:

> Documents and other information provided to a covered tax administration in the course of an ICAP risk assessment will be subject to the covered tax administrations normal rules and practices concerning the use of taxpayer information. These may include the ability or requirement to use such information for purposes other than risk assessment, such as tax audit.[103]

When documents are provided directly by the MNE to the covered tax administrations, the fact that the MNEs voluntarily shared the information supersedes the need for a legal instrument to support the exchange of information. On the other hand, if the MNE shares informa-

100. Id., at p. 23.
101. In this regard, there is no legally enforceable obligation; rather, there are self-imposed behavioural standards, which, if not complied with, in the case of the ICAP can result in the exclusion from the programme. *See* section 4.4. for further comments on the legal form of this obligation.
102. *See* OECD, *Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports* (OECD 2015), available at www.oecd.org/tax/automatic-exchange/about-automatic-exchange/cbc-mcaa.pdf (accessed 30 Apr. 2019).
103. OECD, *supra* n. 28, at p. 39.

tion beyond its legal obligations only because it was acting within the spirit of the ICAP and that information is later used for other purposes,[104] such as by a tax administration that opted out and started domestic tax investigations, it is possible that there is a defect.

Even if, in some countries, the legal system may permit the use of such information, within the context of the ICAP such a situation may hinder cooperation, transparency and trust. The taxpayer is only cooperating by sharing information beyond the required legal obligations because the taxpayer wants to achieve one of the solutions proposed by the ICAP. If the shared information can be diverted to be used for other purposes, the taxpayer may have second thoughts about cooperating beyond what is bound by law.

The full transparency pillar entails obligations that are broader than the simple sharing of information. It also captures the intents of the parties. The taxpayer, when sharing a plan or structure, must also share what his intents were when that plan or structure was implemented. On the other hand, when tax administrations request or receive information, they must be transparent regarding their intentions as to how that information is to be used. If cooperation and transparency are threatened, it is very likely that trust will be damaged and the relationship created between the parties will not be good enough to realize the objectives of the ICAP.

A further point for consideration is that MNEs lose the chance to have their tax risks erased by a statute of limitation. In the pre-entry stage, MNEs must indicate transactions and arrangements that pose "potential risk to the jurisdiction of each proposed covered tax administration".[105] If these risks are made known to several tax administrations, which ultimately may choose to opt out of the ICAP but still use that information to undertake domestic tax audits, is the trade-off worth it for MNEs? Such a situation means that, in practice, by joining the ICAP, MNEs waive the possibility to have any tax issues covered by the statute of limitation.

5.3. Tax administrations must motivate their decisions

Due to the principle of transparency, but also because, within the spirit of the ICAP, MNEs share information beyond their legal obligations, any decision from tax administrations, such as not to act as the lead tax administration or to opt out of the programme, must be duly motivated: "[i]f the UPE tax administration is not willing to act as lead tax administration, it should clearly explain the reasons for this to the MNE".[106]

The reasons could range, for example, from a lack of resources to the risk assessment of the MNE as a high-risk taxpayer. That motivation would permit MNEs to take the actions that they deem necessary, for example, to try to discuss it before the steering group, in a MAP or even in its domestic courts. Proper motivation can ensure, for example, that entry into the programme is subject to transparent and objective suitability criteria.

5.4. The equality principle

The benefits of cooperative compliance programmes, i.e. early certainty and reduced compliance costs,[107] are available only to some taxpayers, i.e. low-risk ones. As a result, concerns have been raised regarding the compatibility of such programmes with the principle of equality before the law. Briefly, the OECD[108] has concluded that (i) by definition the principle of equality requires different taxpayers to be treated differently; (ii) cooperative compliance programmes should never change the amount of tax due; and (iii) there are rational and objective discrimination criteria, being the existence of an adequate TCF and the taxpayers' "willingness to meet the requirements of disclosure and transparency that go beyond their statutory obligations".[109]

It is not possible for tax administrations to have all taxpayers audited every year. As a result, tax administrations have had to decide which taxpayers are to be audited. Cooperative compliance ultimately reinforces the principle of equality, as it makes explicit the discrimination criteria, i.e. the limited tax resources of tax administration are used to audit high-risk taxpayers and the risk profile is determined on the basis of the adequacy of the TCF and the taxpayer's intention to abide by full transparency:

> So long as revenue bodies entering into co-operative compliance with taxpayers do so on the basis of an explicit and objective assessment of the taxpayer's ability and willingness to provide the necessary disclosure and transparency and of the adequacy of the TCF in place, there would seem to be no conflict with the principle of equality before the law.[110]

A contrario sensu, all and any taxpayer that implements an adequate TCF and is willing to abide by full transparency should be entitled to participate in cooperative compliance.

That is not the case with the ICAP, in which, for a start, the suitability criteria is set on the basis of "volume and materiality of the MNE's covered transactions".[111] It is hard to justify discrimination based on such criteria. By allowing only MNEs into the ICAP, tax administrations are not equalizing an unequal situation but, rather, are promoting and increasing the inherent inequalities between MNEs and large, medium and small enterprises. If such large, medium and small enterprises were willing to implement an effective TCF and to commit themselves to the ICAP pillars of cooperation and transparency, why could they not join the ICAP? In practice, it would be difficult for non-MNEs to implement an effective TCF given their lack of funds as well as the inherent weaknesses in their internal controls, primarily due to the fact that the shareholders and board are often, at least partly, the same

104. Id.
105. OECD, *supra* n. 28, at p. 39.
106. Id., at p. 22.
107. OECD, *supra* n. 1, p. 41.
108. OECD, *supra* n. 3, at pp. 45-48.
109. Id., at p. 47.
110. Id., at p. 47.
111. OECD, *supra* n. 28, at p. 15.

persons. The same reasoning applies to the suitability criteria, which makes it necessary to be subject to the filing of a CbC report. In the future, if the ICAP were to move from being a pilot to a permanent programme, the suitability criteria to join the ICAP, as well as the risk assessment of the taxpayers, should be subject to transparent and objective criteria that are more clearly aligned with the equality principle.

5.5. Should the TCF be established in regulation?

The OECD issued recommendations, i.e. "building blocks",[112] in 2016 as to how to set up a TCF and what tax administrations should expect to find in such a TCF. There is no reference to these building blocks in the ICAP. Discussions remain as to whether tax administrations, or even the law, should provide guidelines on how to establish a TCF. None of the 21 respondents to the 2013 OECD survey reported having "the design and implementation of the Tax Control Framework in legislation".[113] One concern is that formal recommendations could lead taxpayers to comply strictly with the letter of the regulations,[114] which could hinder or worsen the quality of existing TCFs.

On the other hand, taxpayers might find themselves in the uncomfortable position of incurring costs to implement a TCF, which, ultimately, may not be accepted by the tax administration as enough to enable cooperative compliance or sufficient for the ICAP. In addition to legal uncertainty, taxpayers could be unable to make financially efficient decisions regarding implementation costs versus the quality of the TCF.

6. Conclusions

The decisions of countries to join the ICAP are often quite political, thereby making it difficult to evaluate the reasons why a country would ultimately join the programme. However, the fact is that the move from 8 to 17 participating jurisdictions in only a year reveals an optimism regarding the ICAP.

In answer to the research question addressed in this article (*see* section 1.), the authors conclude that the ICAP meets the cooperative compliance pillars, especially with regard to trust, transparency and cooperation. There are also differences, as discussed in section 4.4. Taking into account the complete picture, in the authors' opinion, the ICAP is a significant step towards cooperative compliance on a multilateral and an international scale. There are some points to be improved on and/or in need of further development, as noted in sections 4. and 5. The authors, therefore, hope that the ICAP will be given the chance to develop further.

112. OECD, *supra* n. 10.
113. OECD, *supra* n. 3, at p. 58.
114. R. Russo, *Risk Management, Internal Control and Cooperative Compliance in Taxation*, in *The Future of Risk Management, Volume I: Perspectives on Law, Healthcare, and the Environment* pp. 329-350. (P. De Vincentiis, F. Culasso & S.A. Cerrato eds., Palgrave Macmillan 2019), who states that: "The first problem is that all companies are different and the details of a TCF are entity specific. Further more concrete guidance could lead to 'tick the box' behaviour rather than true control."